STATE OF MICHIGAN

IN THE SUPREME COURT OF APPEALS

(On Appeal from the Court of Appeals and Circuit Court for the County of Oakland)

BOARD OF TRUSTEES OF THE CITY OF PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH AND INSURANCE TRUST,

Plaintiff/Appellee,

v.

CITY OF PONTIAC, MICHIGAN,

Defendant/Appellant.

SUP CT NO. 151717

COURT OF APPEALS NO. 316418

Oakland County Circuit Court
No. 12-128625-CZ

PLAINTIFF-APPELLEE'S BRIEF IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

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COUNTERSTATEMENT OF ORDER APPEALED

This is an action for, inter alia, breach of a collective bargaining agreement due to Defendant's failure to provide a contribution for medical benefits due under the contract for fiscal year of 2012. Defendant asserts that the contract was rescinded through an executive order issued by its appointed emergency manager. Defendant seeks leave to appeal from a written opinion of the Michigan Court of Appeals dated March 17, 2015. The written opinion of the Court of Appeals reversed a May 10, 2013 order which had granted summary disposition in favor of Defendant. The Court of Appeals held instead that Plaintiff was entitled to the grant of summary disposition in its favor due to the plain language of an executive order issued by the City Of Pontiac's Emergency manager which revoked certain medical benefits from a collective bargaining agreement only prospectively (See: Defendant's Exhibit I to Supreme Court Application).

This appeal does not warrant Supreme Court relief. The matter is one of interpretation of an executive order pursuant to its plain language. The appeal does not present any issues significant to the jurisdiction of the state; nor does it demonstrate clear, palpable error by the Court of Appeals.

STATEMENT OF ISSUES PRESENTED

I. **DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE EMERGENCY MANAGER'S EXECUTIVE ORDER, BY ITS OWN TERMS, OPERATED PROSPECTIVELY ONLY.**

Plaintiff-Appellee and the Court of Appeals say "Yes."

Defendant-Appellant says "No."

The trial court did not directly address this threshold issue.

II. **DOES EXECUTIVE ORDER 225 VIOLATE THE EMERGENCY MANAGER LAW - P.A. 4 BECAUSE IT IS NOT TEMPORARY AND IT SINGLES OUT ONE CLASS OF EMPLOYEES?**

Plaintiff-Appellee and the Court of Appeals say "Yes."

Defendant-Appellant says "No."

The trial court said "No."

III. **DID DEFENDANT'S FAILURE TO PAY ITS ANNUAL CONTRIBUTION TO THE PF VEBA VIOLATE MICHIGAN'S CONSTITUTION**?

Plaintiff-Appellee and the Court of Appeals say "Yes."

Defendant-Appellant says "No."

The trial court said "No."

STATEMENT OF FACTS

A. Introduction.

Consistent with the written opinion of the Court of Appeals, Defendant City of Pontiac ("Pontiac" or "Defendant") owes Plaintiff Police and Fire Retiree Prefunded Group Health and Insurance Trust ("PF VEBA") the sum of 3,473,923.28, plus interest. This amount represents the unpaid balance of Pontiac's required, annual contribution payable to Plaintiff for fiscal year July 1, 2011-June 30, 2012.

Pontiac has paid its annual contribution to Plaintiff for decades, in response to Plaintiff's annual, actuarial valuation report. However, Pontiac failed to pay its annual contribution for fiscal year 2012. This amount was due on or before June 30, 2012. Pontiac asserts as its defense that the collective bargaining agreement under which the obligation arose was retroactively rescinded by an Executive Order of its emergency manager.

B. Procedural History.

On August 8, 2012, Plaintiff filed its six-count Complaint against the City of Pontiac to compel payment of the City's annual contribution to Plaintiffs for fiscal year July 1, 2011-June 30, 2012. The claims brought by Plaintiff City of Pontiac Police and Fire Retirement System ("PFRS") were dismissed when Pontiac paid its annual, actuarially required contribution to the PFRS.

Defendant filed its Answer to Complaint and Affirmative Defenses on August 15, 2012. Pontiac did not specifically allege that it was not required to pay its annual contribution to the PF VEBA for fiscal year 2012. Further, Pontiac did not allege that any Executive Order terminated the City's obligation to pay into the PF VEBA.

Defendant filed a motion for summary disposition. Plaintiff responded and requested summary disposition pursuant to MCR 2.116 (I)(2). The trial court heard the cross-motions for summary disposition on May 1, 2013, and, at that time, granted Summary Disposition in favor of Defendant for all the reasons set forth in Defendant's Motion. See transcript from motion hearing, **Exhibit A.**

On May 10, 2013, the trial court entered an order which granted summary disposition and dismissed Plaintiff's Complaint, with prejudice.

Plaintiff filed an appeal with the Michigan Court of Appeals.

The Court of Appeals reversed in its written Opinion of March 17, 2015 and held that the Executive Order, by its plain language, did not apply retroactively to eliminate the City's preexisting, past due obligations. Following the denial of Defendant's Motion for Reconsideration, Defendant filed the current Application for Leave to Appeal.

C. Pontiac's obligation to pay its annual contribution to the PF VEBA.

i. Background re: Trust Creation.

The City established by Ordinance the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust ("PF VEBA") to provide health, optical and dental life insurance benefits for retirees who are members of the PFRS and who retired from the City on or after August 22, 1996. The City and the Trustees are the settlors to this Trust, which was created in 1996. The Trust is qualified under the Internal Revenue Code.

The Trust was created, much like in other communities, so that the City could obtain certain tax benefits and obtain a more favorable bond rating while pre-funding retiree health care for police officers and fire fighters (as well as their spouses and dependents) who retired after August 22, 1996, The unions who bargained on behalf of the Police and Fire employees at

the time the Trust was created received a benefit in that the Trust was a mechanism that would pre-fund retiree health care, invest those funds and exist to ensure that retiree health care benefits would be paid in perpetuity.

The Trust Agreement required the City to fund 100% of health care benefits to those eligible under the Trust, at a specific level of coverage. The City was also obligated to provide dental, hearing, vision and life insurance coverage. *Id*.

At the time of the motion hearing, the PF VEBA Trust had over $31 million dollars in assets. The City is required to pay an annual contribution to the PF VEBA Trust, according to an actuarial valuation report. **.** The City failed to make its annual contribution to the PF VEBA for the fiscal year ending June 30, 2011 and fiscal year ending June 30, 2012.

Plaintiff filed suit against the City for its failure to pay its FY 2011 contribution. The case, 2011-121551-CZ, was assigned to Honorable Leo Bowman. After protracted litigation, the City paid $3,243,232.17, or the City's annual contribution, as required by the actuarial valuation report for FY 2011. The City refused to pay the contribution owed for FY 2012.

ii. Applicable Trust Language.

Importantly, the Trust Agreement states as follows:

> …the City notes the cost savings involved with respect to the history regarding this proposal." Trust, p. 1.

The City was required to make contributions, defined as

> "the payment required to be made to the Trustees and to the Trust Fund by the City under the authority such as Ordinance or City Council resolution or under any applicable existing Collective Bargaining Agreements or any future Collective Bargaining Agreements for the purpose of providing group health, hospitalization and dental and optical and group life insurance for employees, retirees and beneficiaries covered by the Plan. *Id*., Section 3, page 2-3**.**

***

> The City-Employer shall be required to pay to the Trust Funds such amounts as the Trustees may determine or actuarially certified and are actuarially necessary to fund the Trust and provide benefits provided by the Plan consistent with actuarial valuations and calculations made by the actuary for the Trust to result in a prefunded plan. Article III, Section 1. Page 6-7, *Id.*

The Trust also states:

> The purpose of this Trust Fund known as the "City of Pontiac Police and Fire Retirees Prefunded Group Health Plan and Trust" is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan established in accordance with the terms of the Trust Fund. The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article IX, Section 24 of the State of Michigan Constitution." Section 1 page 4. (Emphasis added). *Id.*
>
> This Trust…is created for the exclusive purpose of providing …group health and hospitalization and dental and optical insurance in accordance with the Collective Bargaining Agreements between the City and applicable police and fire collective bargaining associations. Section 3. Page 5. *Id.*
>
> The Trust described herein shall be irrevocable…Section 4, page 6. Id.
>
> The Trustees shall carry out the purposes of this Trust Agreement and may maintain any health benefit programs and insurance policy or policies now or in force and effect and available to police and fire retirees of the City of Pontiac or may substitute other comparable or superior policies in lieu thereof. Article V, Section 2 page 12. (Emphasis added). *Id.*
>
> The Trustees shall have the right and duty to enforce payment of all contributions provided for in the Collective Bargaining Agreement and the performance of all obligations provided in this Trust. Article V, Section 4, page 13. (Emphasis added). *Id.*

***

> The City shall not be liable to make contributions to the Trust or pay any expenses whatsoever in connection therewith, except as provided by the terms of the Collective Bargaining Agreements between the collective bargaining associations and the City and the terms of this Trust Agreement. Article VII, Section 1, page 22. *Id.*

D. The Amount Owed by the City to the PF VEBA For Fiscal Year 2012.

According to its consistent practice, the Trustees of the Board hired an actuarial firm to prepare the annual actuarial valuation for the PF VEBA.

The actuary computed the City's required contribution to the PF VEBA Trust to be $4,381.269.00, or 44.65% of valuation payroll. Plaintiff calculated this sum, based on payroll data from the City, to be $3,473,923.28. The payroll was calculated in the same manner as stated above, based on the City's outsourcing of police and fire personnel during the subject fiscal year.

E. Executive Order 225.

On August 1, 2012, the city's Emergency Manager issued Executive Order (EO) 225 that purported to amend the trust pursuant to MCL 141.1519(1)(k) of 2011 PA 4 [now repealed], to terminate the city's annual actuarially required contribution to the trust for fiscal year ending June 30, 2012. The order read in part as follows: "Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations. The Order shall have immediate effect." (See: Defendant's Exhibit F) The issuance of EO 225 was preceded by the EM's letter of July 10, 2012 to State Treasurer Andrew Dillon, seeking concurrence in the EM's plan to invoke the authority of § 19(1)(k) of PA 4 to modify the trust by modifying existing CBAs to eliminate the city's obligation to contribute to the trust. The Emergency Manager stated in the letter that he "anticipated that the City will be required by the Trustees of the VEBA to contribute $3,915,371 during the fiscal year ending June 30, 2013."

In its motion for summary disposition, Pontiac claimed it was not obligated to pay into the PF VEBA pursuant to Executive Order 225, which became effective August 1, 2012, seven (7) days before Plaintiff filed its complaint. Executive Order 225 sought to unilaterally amend the PF VEBA Trust so that the City was no longer required "to continue" to make an annual contribution, as determined by an actuary, to the PF VEBA Trust.

A hearing on the Motion for Summary Disposition was conducted on May 1, 2013. The trial court accepted Defendant's argument that its EM properly modified the city's obligation to contribute to the trust for the fiscal year ending June 30, 2012, by modifying the existing trust agreement and underlying collective bargaining agreement between the city and police and firefighter unions (Tr. 5-1-13, p. 32, attached hereto as **Exhibit A**). The trial court also adopted the balance of Defendant's arguments (id).

STANDARD OF REVIEW

As this appeal is from an order granting summary disposition, appellate review is de novo. *Spiek v Department of Transportation*, 456 Mich 331, 337 (1998).

ARGUMENT I

THE COURT OF APPEALS CORRECTLY HELD THAT THE EM'S EXECUTIVE ORDER, BY ITS OWN TERMS, OPERATED PROSPECTIVELY ONLY

A. The Court of Appeals Properly Interpreted the Executive Order.

Defendant asserts on appeal that the interpretation of the Emergency Manager's Executive Order is governed by principles of statutory interpretation given the EM's statutory authority. Application for Leave to Appeal, p.20

In determining whether a statute should be applied retroactively, "the primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (citation and quotation marks omitted). The Supreme Court recently stated:

> Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application. This is especially true when giving a statute retroactive operation will . . . create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed. Further, [e]ven if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive change in the law.
>
> *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012) (citations and quotation marks omitted; alteration in original).

Further, when the Legislature provides a specific, future effective date and omits any reference to retroactivity, such reference supports the conclusion that the statute applies prospectively only. *Id.* at 432.

The Supreme Court has recognized an exception to the presumption against retroactivity for certain "remedial statutes," or "statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested." *Id.* at 432-433, quoting *Lynch & Co*, 463 Mich at 584. The term "remedial" "in this context should only be employed to describe legislation that does not affect substantive rights. Otherwise, [t]he mere fact that a statute is characterized as 'remedial'... is of little value in statutory construction." *Lynch & Co*, 463 Mich at 585 (citation and quotation marks omitted; alteration in original). See also *Johnson*, 491 Mich at 433.

MCL 141.1519 set forth the enumerated powers of an emergency manager. Admittedly, the emergency manager had the ability to reject or modify a contract. MCL 141.1519(1)(k). Further, the emergency manager had the authority to enter into agreements with creditors. MCL 141.1519(1)(w). This statute exists within what is collectively referred to as PA 4, the Emergency Manager Law. This law was suspended on August 8, 2012 when a requisite number of signatures to place the issue on a ballot referendum were obtained. Michigan's voters then voted to repeal Public Act 4. Michigan's legislature subsequently revised the Act, now known as PA 436, which became effective approximately April 1, 2013. PA 4 nonetheless applies to this action.

> MCL 141.1519 stated in pertinent part:
>
> (k) After meeting and conferring with the appropriate bargaining representative and, if in the emergency manager's sole discretion and judgment, a prompt and

> satisfactory resolution is unlikely to be obtained, **reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement**. The rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement under this subdivision is a legitimate exercise of the state's sovereign powers if the emergency manager and state treasurer determine that all of the following conditions are satisfied:
>
> (i) The financial emergency in the local government has created a circumstance in which it is reasonable and necessary for the state to intercede to serve a significant and legitimate public purpose.
>
> (ii) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is reasonable and necessary to deal with a broad, generalized economic problem.
>
> (iii) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is directly related to and designed to address the financial emergency for the benefit of the public as a whole.
>
> (iv) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is temporary and does not target specific classes of employees.
>
> MCL141.1519(k) [emphasis added].

In holding that the Executive Order did not by its terms operate retroactively to eliminate the city's preexisting medical contribution requirements, the Michigan Court of Appeals held below:

> The plain language of Executive Order 225 provides that the trust is "amended to remove Article III obligations of the City to continue to make contributions to the Trust." (Emphasis added.) The term "continue" means to "go on or keep on without interruption, as in some course or action." Random House Webster's College Dictionary (1992). Plainly, the term "continue" relates to present and future action. Further, Executive Order 225 provided it "shall have immediate effect." Because Executive Order 225 was adopted August 1, 2012, given immediate effect and applied to the present of present or future obligations under art III, § 1, by its own terms, it did not apply to the to the city's already accrued actuarial required contribution to the trust for the already ended fiscal year July 1, 2011 through June 30, 2012.
>
> Slip opinion, p. 10

As the Court of Appeals reasoned, the Executive Order's use of the phrase "continue to" relates to present and future action (e.g. the city would no longer have an obligation to make contributions to the Trust). However, contrary to Defendant's argument, nothing in the Order's language eliminates the duty to contribute with respect to past obligations that remain outstanding. In fact, by having an effective date of "immediate" while omitting any reference to retroactive obligations, the executive Order was given an interpretation consistent with the dictates of *Johnson*, *supra*.

In addition, Defendant's argument that the Executive Order should be given retroactive effect to apply to overdue contributions is contrary to the recognition that exceptions to the presumption against retroactivity should only be given to 'remedial" statutes which do not affect substantive rights. *Lynch & Co*, *supra*. Indeed, Defendant ignores that its interpretation of the Executive Order would indeed affect substantive rights, thereby precluding its presumption of retroactive application.

This analysis is both simple and controlling; indeed, the controlling analysis of interpretation compels the denial of any affirmative relief by the Supreme Court.

B The Court of Appeals Did Not Serve as an Advocate By Resolving A Controlling Issue Beyond the Briefing of the Parties; Indeed, Appellate Courts May Disregard The Preservation Requirement For Issues Of Law Where All Necessary Facts Have Been Presented.

Generally, to preserve an issue for appellate review, the issue must be raised before and decided by the Trial Court. *Detroit Leasing Company v City of Detroit*, 269 Mich App 233, 237; 713 NW 2d 269 (2005) citing *Fast Air, Inc. v Knight*, 235 Mich App 541, 549 (1999). However, this Court may disregard the preservation requirement for issues of law where all necessary facts have been presented. *Detroit Leasing Company, supra at 237-238*, citing

Steward v Panek, 251 Mich App 546, 554; 652 NW2d 232 (2002). In *Tingley v Kortz*, 262 Mich App 583; 688 NW 2d 291 (2004), the Court held "this Court possesses the discretion to review a legal issue not raised by the parties. *Id.* at 588, citing *Mack v Detroit,* 467 Mich. 186, 206-208; 649 NW2d 47 (2002) (stating that "the jurisprudence of Michigan cannot be, and is not, dependent upon whether individual parties accurately identify and elucidate controlling legal questions").

Plaintiff's response to Defendant's Motion for Summary Disposition pursuant to MCR 2.116(I)(2) and its Appellant's Brief filed in the Court of Appeals made clear that Plaintiff was seeking repayment of the entire amount owed by the City to the Police and Fire VEBA for the fiscal year ending June 30, 2012, plus attorneys' fees and interest. See page 2, Plaintiff's Motion for Summary Disposition. See Plaintiff's Brief on Appeal brief pp. 14-15. Plaintiff always asserted that the EM's Executive Order did not apply to eliminate past due contributions.

Plaintiff asserted in its response to Defendant's Motion for Summary Disposition:

> "Pontiac has not paid the annual contributions as sought in the Complaint. Defendant filed its answer to Complaint and Affirmative Defenses on August 15, 2012. Pontiac did not specifically allege that it was not required to pay its annual contribution to the PF VEBA for fiscal year 2012. Further, Pontiac did not allege that any Executive Order terminated the City's obligation to pay into the PF VEBA."
>
> See page 2, Plaintiff's Response to Motion for Summary Disposition.

Also, Plaintiff argued in its summary disposition response:

> **D. Executive Order 225**
>
> Pontiac's motion claims it is not obligated to pay into the PF VEBA pursuant to Executive Order 225, which became effective August 1, 2012. Executive Order 225 purports unilaterally to amend the VEBA Trust so that the City is no longer required to make an annual contribution, as determined by an actuary, to the Police & Fire VEBA Trust.

> …Plaintiff also believes this Executive Order cannot be applied retroactively to extinguish a debt owed by the City and that was past due before the Order was entered.
>
> *Id.*, pp. 5-6.

It is clear from a review of Plaintiff's filings within the record that Plaintiff argued that the City's annual contribution owed to the Police and Fire VEBA for fiscal year ending June 30, 2012 became past due on July 1, 2012. Further, Plaintiff argued that the Emergency Manager's Executive Order dated August 1, 2012 should not be applied retroactively to eliminate this contribution. All issues regarding the retroactive applicability of the Executive Order to preexisting obligations to contribute have been preserved and were properly considered by the Court of Appeals.

Nonetheless, the interpretation and lawful application of the Executive Order presented issues of law involving undisputed facts were presented. The Executive Order was attached to both party's briefs as an Exhibit, as were the underlying request to the state's Treasurer and the Treasurer's approval. The parties discussed the Executive Order, and the date on which the City's annual contribution became due for fiscal year ending June 30, 2012, in both the briefs and at the oral arguments in the Court of Appeals. The Court of Appeals' analysis focused on the language of the subject Executive Order. Since all necessary facts were presented, the Court of Appeals' consideration of the interpretation of the executive Order was entirely proper.

ARGUMENT II

EXECUTIVE ORDER 225 VIOLATES THE EMERGENCY MANAGER LAW - P.A. 4 BECAUSE IT IS NOT TEMPORARY AND IT SINGLES OUT ONE CLASS OF EMPLOYEES

As stated, MCL 141.1519 set forth the powers of an emergency manager and permitted the modification of an existing collective bargaining agreement under limited conditions. Two of these conditions are that the modification must be "temporary" and does not target specific classes of employees. The EM did not satisfy either of these conditions here. In addition, neither the trial court nor the Court of Appeals addressed these specific challenges to the Executive Order that were set forth in the Plaintiff's briefs filed with those courts.

First, Executive Order 225 is clearly not temporary. MCL 141.1519(K)(4). The Michigan Court of Appeals and Black's Law Dictionary (8th ed) define "temporary" as "[l]asting for a time only; existing or continuing for a limited time; transitory." *Bandeen, v Public School Employees Retirement Board*, 282 Mich App 509; 766 NW2d 10 (2009). Here, the dictates within the Order are not limited in duration and will remain in effect until the Order is expressly repealed. Indeed, the Order specifically states that the Defendant's obligations to contribute are to be "removed" (e.g., "terminated," not "temporarily" suspended) (see: Defendant's Exhibit D, p. 2).

Secondly, the amendment violates the Emergency Manager Act because it is "directed at a specific class of employees." Executive Order 225 specifically states that it applies only to those retirees who retired after August 22, 1996, a specific class of employees (*Id.*, p.2). The Executive Order also only applies to those police and fire retirees who are eligible for the VEBA (id). The VEBA-eligible members constitute one portion of the police and fire retirees.

Clearly, the Emergency Manager singled out these individuals by terminating payment into the PF VEBA.

For these additional reasons, Defendant's Application for Leave to Appeal is without merit and should be denied.

ARGUMENT III

DEFENDANT'S FAILURE TO PAY ITS ANNUAL CONTRIBUTION TO THE PF VEBA VIOLATES MICHIGAN'S CONSTITUTION.

Any accrued financial benefits of a public retirement system pension plan are, by constitutional mandate stated in *Const. 1963, Article 9, Section 24*, a contractual obligation that cannot be diminished or impaired. This section of the Constitution requires that benefits arising out of account of service rendered in each year be funded during that year.

Michigan's Const. Article 9 §24 provides as follows:

> Public Pension Plans and Retirement Systems. Obligation. The accrued financial benefits of each pension plan and retirement system of the State and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits, annual funding. Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

Also, under the Michigan Constitution, no law "impairing the obligation of contract shall be enacted," Const. 1963, art 1, § 10. Likewise, the federal constitution prohibits any state from passing any "Law impairing the Obligation of Contracts . . . ," US Const, art I, § 10. The Contract Clause protects "bargains reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements." *Health Care Ass'n Workers Compensation Fund v Dir of the Bureau of Worker's Compensation*, 265 Mich App 236, 240; 694 NW2d 761 (2005). However, the clause is not absolute, but "must be accommodated to the

inherent police power of the State to safeguard the vital interests of its people." *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 410; 103 S Ct 697; 74 L Ed 2d 569 (1983). "[S]tate regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." *Id.* at 411.

In analyzing a Contract Clause issue, Michigan courts utilize a three-pronged test. The first prong considers whether the state law has operated as a substantial impairment of a contractual relationship. The second prong requires that legislative disruption of contractual expectancies be necessary to the public good. The third prong requires that the means chosen by the Legislature to address the public need be reasonable. In other words, if the impairment of a contract is only minimal, there is no unconstitutional impairment of contract. However, if the legislative impairment of a contract is severe, then to be upheld it must be affirmatively shown that (1) there is a significant and legitimate public purpose for the regulation and (2) that the means adopted to implement the legislation are reasonably related to the public purpose. *Health Care Ass'n*, 265 Mich App at 241 (citations omitted). For a substantial impairment of a contract to be reasonable and necessary, the state must not impose a dramatic impairment when a more moderate course would serve its purposes equally as well. *City of Pontiac Retired Employees Assoc. v Schimmel,* 751 F 3d 427,431 (6th Cir 2014).

In a similar action filed by the City of Pontiac Retired Employees Association against the City of Pontiac and its Emergency Manager, the Sixth Circuit held that a complete analysis of the constitutional ramifications arising from a similar Executive Order terminating accrued medical benefits required fact finding from the trial court as to whether, *inter alia*, "the reductions and eliminations of health care benefits were 'necessary and reasonable' under the Contract Clause." 751 F 3d at 433.

Plaintiff reiterates that leave to appeal should be denied for the reasons set forth in Arguments I and II, above. However, in the alternative, should the Supreme Court order a remand, any remanded activities should include a complete constitutional analysis by the trial court. In the instant action, Plaintiff has repeatedly contested the applicability of *Studier v Michigan Public Schools Retirement Board*, 472 Mich 642; 698 NW 2d 350 (2005) because, unlike in *Studier*, this action involved an impairment of contractual rights. Given the applicability of the state and federal constitutional Contractual Clauses, any remand orders should be consistent with the remand order in *City of Pontiac Retired Employees Assoc. v Schimmel*, *supra*.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee respectfully requests that this Honorable Court deny leave to appeal.

Respectfully submitted,

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By: /s/ Ronald S. Lederman

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